No. 16530

United States
Court of Appeals
for the Ninth Circuit.

B. A. WILLIAMS, II,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

APPELLANT'S REPLY BRIEF

ARTHUR A. BROOKS, JR.
6331 Hollywood Blvd.,
Hollywood 28, Calif.
Attorney for Appellant.

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APPELLE'S STATEMENT OF THE CASE

Appellant makes the following observations with regard to the statement of the case as mentioned in the

brief filed by the United States. (Appellee's Brief, pp. 1-6)

The Government states that the Information here "followed form 3 of the sample forms attached to the Federal Rules of Civil Procedure, and therefore did not allege that Appellant "knowingly" caused the mails to be used." (Brief, p. 3). It is submitted that the use of a Form in drafting an Information charging a crime carries no weight in establishing the sufficiency of an Information. The word "knowingly" is in the statute under which Appellant was here charged. (Appellant's Opening Brief, p. 9). Can it be assumed that the Congress had an intent that the term should mean nothing when the statute was enacted many years ago and reenacted from time to time?

The Government stresses an alleged admission by Appellant that he was engaged in check kiting (Brief, p. 3, p. 6), and refers to Appellant's statements to a Government witness, Klenske, at pp. 61 and 62 of the Record in the following language:

> "A bank of Hawaii official testified that the Appellant stated to him that Appellant had been conducting a "check kite" during the period alleged (R. 61 and 62)."

An examination of the Record (bottom p. 61 and top p. 62, pp. 138-139) shows that the words relied

on by the Government were substantially those of the Government witness himself insofar as use of the term "kiting" is concerned.

Referring to the Government's discussion (Brief, p. 4) of the dates of certain checks as being prior to the date (April 24, 1958) when Appellant was advised by his Seattle manager, Mr. Doing, that $46,000.00 was going to be deposited for Appellant there, it is submitted that the dates as appearing on the checks themselves are meaningless. Appellant, in order to mollify his creditors, was obviously predating and post-dating checks from time to time (Record, p. 147).

APPELLEE'S ARGUMENT

POINT I

Appellee relies heavily on Pereira v United States, 347 U.S. 1, 8, (1954) (Brief, p. 6-7). An examination of that case, however, reveals that the Information therein was not attacked on appeal, and the case, therefore, can be distinguished from the case at bar on that ground. Nor are the facts in Pereira even remotely parallel to those here.

The case of Moffitt v United States, 154 F 2d 402 (10th Cir. 1946) contains instructive language as to

kind of knowledge a defendant charged with mail fraud under the statute must have as to the use of the mails. At page 406 the Court states:

> "By his act of depositing the check for collection, he (the defendant) constituted the bank his agent in transmitting the check to the bank on which it was drawn for payment. He also knew that the ordinary and usual method of transmitting such an item was by use of the mails. He also knew that the ordinary and usual method of notifying the collecting bank of payment was by use of the mails. This he must have known from the fact that he was informed that it would be about ten days before he could check against the deposit." (Emphasis added)

Nowhere in the record in the instant case is there any evidence whatever that Appellant was informed that there would be a delay before he could check against the several deposits detailed in the Information.

Appellee points out (Brief, p. 8) that the trial court did use the word knowingly in its charge to the jury. This is certainly recognition that the element of knowledge of the use of the mails in the carrying out of a fraudulent scheme is a necessary element of the offense charged, but it cannot cure the omission in the Information.

Stevens v United States, 227 Fed. 2d 5 (8th Cir.

1955) is cited by the Government in connection with another point at page 11 of the Government's brief. That case involved a check kiting scheme carried on by defendant utilizing some banks in Iowa and with the complicity of a bank official. As stated by the Court, p. 6:

> "Clarence Orville Stevens, the Appellant, was charged with willfully and knowingly devising a scheme to defraud the Cambridge State Bank." (Emphasis added)

No such charge is contained in the Information upon which Appellant was here tried.

U. S. v Weisman, 83 Fed. 2d 470 (CCA 2 - 1936) cited by Appellee in Brief, (p. 7) involved a mail fraud indictment employing the terms "unlawfully, willfully and knowingly". One question raised there was that of variance between the indictment and the trial court's charge to the jury omitting such terms. That question is not involved in the case at bar. Appellant does not complain of the trial court's charge on this point, but does attack the Information as being fatally defective for omitting the vital statutory term "knowingly". Weisman is also different on its facts as it involved the sending of letters through the mails in connection with a swindle whereby the defendant obtained hudreds of thousands of dollars

for his own use.

In Webb v United States, 191 Fed. 2d, 512 (10th Cir. 1951) cited by Appellee, (Brief, p. 8) the indictment set forth in great detail a fraudulent scheme whereby defendant obtained mail orders and received payments which he did not return for scarce merchandise he could not furnish. The indictment alleged that defendant personally placed post cards soliciting orders for such merchandise in the mails. The court held that such allegations were sufficient to allege knowing use of the mails, even though the statutory language itself was not employed. No such situation appears in the case at bar.

In neither Kreuter v U. S., 218 Fed. 2d, 532 (5th Cir. 1955); or Abbott vs. U. S., 239 Fed. 2d 310 (5th Cir. 1956), cited by Appellee (pp. 8-9), were the indictments or Informations attacked as insufficient as here. Both cases involved actual swindles whereby defendants obtained money or property of value through fraudulent schemes involving use of the mails.

APPELLEE'S ARGUMENT

POINT 2

The statement made by Appellee (Brief, p. 10)

that "the success or failure of the scheme has nothing to do with the existence of a scheme to defraud" may hold water as a generality. However, the case of U. S. v Feldman, 136 Fed. 2d 394 (2nd Cir. 1943) cited by Appellee in support of such statement clearly showed a successful scheme - one victim was bilked to pay off another. (Opinion, p. 396).

Appellee in arguing that the evidence was sufficient to support the verdict (Brief, p. 10), cites U. S. v Broxmeyer, 192 Fed. 2d 230 (2nd Cir. 1951), where a guilty defendant "had no reason to believe that his legitimate sources of income would suffice to make the checks good". Again, such is not the situation here. The record again and again shows that Appellant Williams had every reason to believe that some $46,000.00 had been realized from operations of his Seattle office, (Record, p. 111) and other funds were being raised from the sale of leases. (Record, p. 61).

In conclusion it is emphasized that in all of the cases cited by Appellee there was something more than the mechanical use of the mails by a bank in forwarding checks for collection. Actual swindles were perpetrated by the several defendants, fictitious names were used, letters and postcards were mailed to "sucker" lists, etc. None of these or similar

"con-game" elements are present here.

For the reasons set forth hereinabove and in Appellant's Opening Brief, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

ARTHUR A. BROOKS, JR.

Attorney for Appellant,
B. A. WILLIAMS II.